

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

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DISPATCHED BY MM Docket No. 93-24 ✓

In re

Amendment of Part 74 of the
Commission's Rules With Regard
to the Instructional Television
Fixed Service

NOTICE OF PROPOSED RULEMAKING

Adopted: February 11, 1993; Released: February 25, 1993

Comments Due: April 19, 1993.

Reply Comments Due: May 19, 1993

By the Commission: Commissioner Marshall not participating.

1. The Commission, on its own motion, proposes to modify one of the procedural rules governing the Instructional Television Fixed Service (ITFS). We propose to amend the method by which ITFS applications are filed and processed. Currently, applicants for new ITFS stations or major changes in existing stations are subject to the traditional A/B cut-off approach described below in paragraph 3. We seek comments addressing a possible change to an approach using filing windows, which would allow us to control better the flow of applications and process them more efficiently. In addition, during the pendency of this proposed rulemaking, we shall not accept applications for new ITFS facilities or major changes in existing ITFS stations, with the following exceptions: we shall accept for filing applications in which the applicant relies on the National Telecommunications and Information Administration for construction funds, as well as applications that are submitted in response to outstanding "A" cut-off lists.

BACKGROUND

2. In 1983, the Commission authorized ITFS licensees to lease their excess channel capacity to wireless cable operators.¹ *Report and Order* in Gen. Docket No. 80-112 (*Instructional TV Fixed Service*), 94 FCC 2d 1203 (1983). The Commission was concerned that ITFS channels were not being heavily utilized except in a few major metropolitan areas, although the service had existed for two decades.² *Instructional TV Fixed Service* at 1214. The Commission

found that the cost of constructing and operating an ITFS system represented a significant burden to potential and existing licensees, and that additional revenue sources were necessary in order to give the service a chance to flourish. *Id.* at 1250. The Commission also determined that the income derived from the leasing of excess channel capacity could enable ITFS operators to broadcast during a greater portion of the day, could increase programming availability, and could result in the activation of currently vacant channels. *Id.*

3. At the time the Commission acted, ITFS was an underutilized service. *Id.* at 1211-14. No cut-off periods or other procedural restrictions then existed for the filing of petitions to deny or of mutually exclusive applications. However, the authorization of excess capacity leasing led to an increase in the number of applications filed, and the rules did not allow for an orderly, efficient, and equitable processing of those applications. *Further Notice of Proposed Rulemaking* in MM Docket No. 83-523 (*Instructional Television Fixed Service*), 98 FCC 2d 1249, 1259-60 (1984). Accordingly, the Commission inaugurated a cut-off procedure. Analyzing the options before it, the Commission rejected a proposed window approach and determined that the traditional A/B cut-off procedure would best serve the public interest. *Second Report and Order* in MM Docket No. 83-523 (*Instructional Television Fixed Service*), 101 FCC 2d 49 (1985). This procedure involves placing the first application(s) accepted for filing and determined to be substantially complete on a public notice called an "A cut-off list." This list notifies the public that the application has been accepted and gives interested parties 60 days to file competing applications or petitions to deny. An applicant placed on the "A" cut-off list is required to make any major changes to its proposal before the end of the cut-off period. After the "A" period expires, the staff places all substantially complete applications which were filed during that period and found to be mutually exclusive with any listed "A" application on a "B" list. This list notifies the public that the specified applications have been accepted for filing, and it provides 30 days for the filing of petitions to deny or minor amendments. When it inaugurated the A/B cut-off procedure for ITFS applications, the Commission believed that use of a filing window would have been inappropriate, because educational institutions generally lack expertise in filing for Commission licenses and frequently require time to obtain government funding and to negotiate an excess capacity lease. *Id.* at 73.

4. Since the Commission first considered these issues several years ago, however, the telecommunications environment has changed substantially, and we have significantly amended our regulations to avoid inhibiting the growth of ITFS and wireless cable services in that new environment. In the last three years we have modified the minimum programming requirements for new ITFS operators;³ authorized 15-mile interference protection for ITFS licensees which lease excess capacity for wireless cable operations;⁴ authorized the use in some situations of channel mapping technology by ITFS licensees and wireless

¹ We do not intend to suggest by our use of the term "wireless cable" that it constitutes "cable" service for statutory or regulatory purposes.

² The Commission inaugurated ITFS in 1963. *Report and Order* in Docket No. 14744 (*Educational Television*), 39 FCC 846 (1963), *recon. denied*, 39 FCC 873 (1964).

³ *Report and Order* in Gen. Docket Nos. 90-54 and 80-113 (*Wireless Cable Order*) 5 FCC Rcd 6410, 6416 (1990).

⁴ *Order on Reconsideration* in Gen. Docket Nos. 90-54 and 80-113 (*Wireless Cable Reconsideration*) 6 FCC Rcd 6764, 6766-67 (1991).

cable lessees;⁵ and modified our "ready recapture" requirement with regard to excess channel capacity leasing by eliminating unduly restrictive time-of-day and day-of-week regulations.⁶ Educational institutions and wireless cable entities have responded enthusiastically to these changes, creating the environment necessary for building and maintaining robust ITFS and wireless cable services.

5. With these changes, there has been a tremendous increase in the number of applications proposing the construction of new ITFS stations or major changes in the authorized facilities of such stations. In fiscal year 1991 alone, 454 new or major change ITFS applications were filed, a total that nearly equalled the aggregate number of such applications that had been filed in the four previous fiscal years. In fiscal year 1992, which ended September 30, 1992, the rate of application receipts increased steadily. As a result, we received in that time 878 applications, nearly twice the number of new or major change ITFS applications than had been filed in FY 1991. In addition, the nature of these recently filed ITFS applications changed dramatically. As the interest in the ITFS service grew, more and more of the applications filed were found to be mutually exclusive with ITFS applications listed on "A" cut-off notices.⁷ The cut-off procedure has become inefficient, requiring an initial processing of a substantial number of applications simply to place them on an "A" cut-off list, with little benefit. Because each application must be processed a second time for legal and technical analysis, we are confronted with time-consuming double processing, which is an inefficient use of Commission resources. Further, more than 90% of these recently filed applications contained excess capacity lease agreements with wireless cable operators that were to provide substantial funding for the construction and operation of the ITFS facilities. This dramatic increase in the number and mutually exclusive nature of ITFS applications has significantly burdened our capacity to expeditiously and effectively authorize service, thereby prompting the filing window proposal we outline below.

FILING WINDOW PROPOSAL

6. Specifically, we seek comment on modifying the rules, so as to replace the above system with one utilizing filing windows, such as currently used by the low power television service.⁸ This approach would specify a limited period of time for filing applications for new facilities, applications for major changes in existing facilities, or major amendments to pending applications.⁹ The Commission would give Public Notice no fewer than 60 days or some longer period before opening a filing window, so as to provide adequate time for potential applicants to prepare. The window would remain open for a specified number of

days, and no application would be accepted before or after the stated window of opportunity for filing. Applications not mutually exclusive with any other application and found to be acceptable would be placed on a proposed grant list; mutually exclusive applications would be placed on Public Notice. In each case, we would provide a 30-day period for the submission of petitions to deny. Single uncontested applications could then be granted, and winners could be selected from among the mutually exclusive applications pursuant to the selection process currently in use. Under our proposal, applications which have already been tendered but not yet placed on an "A" cut-off list as of the adoption date of this Notice would not be placed on a cut-off list. Rather, they will be considered cut off as of the close of the first filing window. Applications already cut off or filed in response to an outstanding "A" cut-off list¹⁰ will be processed under existing standards.

7. We believe that use of a filing window will allow the staff to control the flow of applications better, thereby significantly improving processing efficiency. In addition, many of the factors that made the Commission wary of a window procedure at the time it adopted the A/B cut-off approach¹¹ are now considerably less relevant, due to the substantial changes in the ITFS and wireless cable services that have occurred since 1985. The dramatic increase in excess channel capacity lease agreements between ITFS and wireless cable operators greatly diminishes our initial concern that educational institutions would require a substantial amount of time to obtain funding before applying for an ITFS license. Our analysis of the lease agreements reveals that the wireless cable entities almost always pay for the construction of the ITFS facilities. In addition, as wireless cable entities have gained experience with excess capacity leases, their agreements have become more uniform; therefore, less time is needed to negotiate them. Finally, unlike educational organizations, the wireless cable operators have expertise in filing for Commission licenses, and they frequently have in-house legal and engineering staff who can expeditiously prepare ITFS applications. As a result of all of these changes, it appears that the Public Notice announcing the opening of a filing window would provide educational institutions with sufficient time to prepare their applications. It also appears that potential ITFS licensees and wireless cable operators could form an excess capacity agreement and prepare an application in advance of a window Public Notice, in preparation for the next window.

8. We seek comment, therefore, on whether circumstances have sufficiently changed since 1985 to warrant a departure from the current method of filing applications. Commenters are also invited to address how far in advance a window should be announced. We additionally seek comment on how much time is sufficient to keep the window

⁵ *Id.* at 6774.

⁶ *Id.*

⁷ To resolve cases involving mutually exclusive applications, a comparative selection process is used, by which points are awarded based on specified criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum was established. *Second Report and Order*, 101 FCC 2d 49 (1985). Applicants remaining tied after the points are awarded engage in a tie-breaker involving the number of students they have enrolled. *Third Report and Order* in MM Docket No. 83-523 (*Instructional Television Fixed Service*), 4 FCC Rcd 4830 (1989).

⁸ See *Report and Order* in MM Docket No. 83-1350 (*Low Power Television*) 102 FCC 2d 295 (1984).

⁹ Under our proposal, we will accept the filing of applications for minor changes, as defined by Section 74.911(a) of the Commission's Rules, at any time. If such a change is mutually exclusive with a tendered (but not yet cut off) application pending as of the adoption date of this Notice, it will be considered in conjunction with that application.

¹⁰ The currently outstanding "A" cut-off lists were released on December 17, 1992, and February 10, 1993.

¹¹ See *Second Report and Order* at 73-74.

open. Should we open the window in parallel with National Telecommunications and Information Administration (NTIA) funding grant periods? We emphasize that our proposed rulemaking involves only the narrow area of the filing window for applications for new ITFS facilities, applications for major changes to existing stations, and major amendments to pending applications; interested parties should accordingly restrict their comments to that particular issue.

9. We believe that potential ITFS applicants, in order to apply for a license or a major change before the possible adoption of a filing window rule, may inundate the Commission with applications while the "A" and "B" cut-off rule is still in effect. This would defeat the purpose of the proposed rulemaking and would force us to divert scarce Commission resources to the task of processing an even larger quantity of applications than already exists. Accordingly, for a short period of time, we will not accept applications for new ITFS facilities or for major changes to existing facilities.¹² However, we will continue to process applications that are already on file and already cut off. We will also continue to accept (but not process) applications in which the applicant relies on NTIA for construction funds. Otherwise, potential ITFS applicants would be unable to apply for NTIA funding, because NTIA rules require such applicants to file their applications with the Commission before seeking funding. We will consider these applications cut off as of the close of the first filing window. In addition, we will continue to accept and process applications filed in response to the two outstanding "A" cut-off lists.¹³ We intend to resume accepting applications expeditiously for new ITFS facilities and for major changes in existing ITFS stations upon final disposition of the matters raised in this proceeding. We believe that this procedure will allow us to resolve some of the problems confronting the evolving ITFS and wireless cable services with no appreciable delay in processing applications. The short delay engendered by our actions in this *Notice* will shortly result in more efficient and rapid authorization of service to the public.¹⁴

APPENDIX

A. Ex Parte Considerations

10. This is a nonrestricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. See generally, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

¹² Our decision not to accept the enumerated types of applications for a short period of time is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). See *Kessler v. F.C.C.*, 326 F.2d 673 (D.C. Cir. 1963). In any event, pursuant to 5 U.S.C. Section 553(d)(3), we find that a delay in the effectiveness of this action could substantially undercut the goals we intend to achieve, contrary to the public interest. Accordingly, we find good cause to make our decision not to accept the applications effective on the date of adoption.

¹³ See n.10, above. We will also continue to accept major change proposals where they are filed in the same market to accommodate settlement agreements among applicants that have previously achieved cut-off status and where the settlement

B. Comment Information

11. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before April 19, 1993 and reply comments on or before May 19, 1993. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, room 239, at the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

C. Initial Regulatory Flexibility Analysis

12. *Reason for the Action:* This proceeding was initiated to review and update the procedures which govern the filing of applications for new ITFS channels.

13. *Objective of this Action:* The action proposed in this *Notice* is intended to improve ITFS and wireless cable service by making the regulations that govern applying for a new ITFS channel consistent with the continuing evolution of the telecommunications industry.

14. *Legal Basis:* Authority for the action proposed in this *Notice* may be found in Sections 1, 3, 4(i) and (j), 303, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303, 308, 309, and 403.

15. *Number and Type of Small Entities Affected by the Proposed Rule:* Approximately 1,200 existing and potential wireless cable and ITFS operators would be affected by the proposal contained in this *Notice*.

16. *Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:* The proposal suggested in this *Notice* would authorize ITFS applicants to file for a license only during specific windows. The Commission has found such a procedure to be an efficient means of controlling the flow of applications in rapidly expanding services.

17. *Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:* None.

18. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:* The proposal contained in this *Notice* is meant to

resolves mutually exclusive applications.

¹⁴ The Commission recently authorized wireless cable entities to apply in specified limited circumstances for licenses to operate on ITFS frequencies. See *Second Report and Order* in Gen. Docket No. 90-54, 6 FCC Rcd 6792, 6801-06 (1991). Both our decision not to accept the enumerated types of applications and the window filing procedure discussed in this *Notice* apply to such wireless cable applicants. In that regard, we also note that the filing procedure affecting ITFS channels discussed in this *Notice* is independent of that currently in place on the filing of applications for Multipoint Distribution Service channels. See *Notice of Proposed Rulemaking* in PR Docket No. 92-80, 7 FCC Rcd 3266, 3270 (1992).

make the regulations that govern applying for a new ITFS channel consistent with the continuing evolution of the telecommunications industry.

19. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposal suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

D. Paperwork Reduction Act Statement

20. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose no new or modified information collection requirement on the public.

E. Ordering Clause

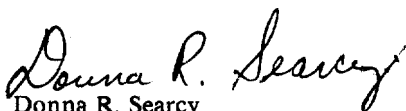
21. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4(i) and (j), 303, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303, 308, 309, and 403, this *Notice of Proposed Rulemaking* IS ADOPTED.

22. IT IS FURTHER ORDERED, upon adoption of this *Notice of Proposed Rulemaking*, that no applications for new ITFS facilities or for major changes to existing ITFS facilities will be accepted for filing by the Federal Communications Commission until further notice by the Commission. However, such applications in which the applicant relies on the National Telecommunications and Information Administration for construction funds will be accepted, but not processed. In addition, applications filed in response to the outstanding "A" cut-off lists of December 17, 1992, and February 10, 1993, will be accepted and processed.

F. Additional Information

23. For additional information on this proceeding, contact Paul R. Gordon, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION


Donna R. Searcy
Secretary